IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
MUNICIPAL CORPORATIONS, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The District Court's opinion and order of May 1, 1975, denying Petitioner's motion to dismiss and alternative motion to stay, set forth in the Petitioner's Appendix at 31a, are not officially reported. They appear at 1975-1 CCH Trade Cas. ¶60,318 and at 18 P.U.R. 4th 175. The October 22, 1976 order of the District Court denying Petitioner's motion to reconsider, vacate, set aside and amend the court's order of May 1, 1975, set

forth at Pet. App. 54a, is not reported. The Court of Appeals' order and opinion, reported at 506 F.2d 1314 (7th Cir. 1977), are set forth at Pet. App. 6a and 7a.

JURISDICTION

The jurisdictional prerequisites are set forth in the Petition.

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit correctly decided that the Federal Power Act does not deprive the District Court of jurisdiction to consider the plaintiff municipalities' complaint that the defendant electric power company, by filing rates before regulatory agencies in a way that prevents competition, violates the Sherman Act.

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, is set forth at Pet. App. 4a. Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, are set forth at Pet. App. 4a and 5a. Sections 205 and 206 of the Federal Power Act, 16 U.S.C. § 824(d) and § 824(e), are set forth at Pet. App. 1a and 3a.

STATEMENT OF THE CASE

Respondents are ten municipalities that operate their own electric distribution systems and depend for their supply of electric power on Indiana & Michigan Electric Company, a company that also competes against them for retail sales. The municipalities' complaint filed March 25, 1974 seeks relief pursuant to Section 2 of the Sherman Act against the defendant Company's otherwise unregulated practice of monopolizing and attempting to monopolize the business of selling electric power at retail. The complaint alleges that the defendant Indiana & Michigan Electric Company, ("I&M") by the wholesale rates it files before the Federal Power Commission (now the Federal

Energy Regulatory Commission), which automatically go into effect, requires the plaintiff municipalities to pay a higher price for electric power than the price the defendant charges its own comparable retail industrial customers, thereby preventing the plaintiffs from competing against the defendant for retail industrial sales. The complaint requests a declaratory judgment that I&M has violated the Act and an injunction against further violations, pursuant to Section 16 of the Clayton Act.

The Company's motion to dismiss the complaint on the grounds that the Commission has exclusive jurisdiction of the claims alleged by the complaint and the defendant's motion to stay proceedings pending the conclusion of proceedings before the Commission were denied by the District Court on May 1, 1975. On October 22, 1976 the District Court denied the Company's motion to vacate and set aside its previous order. The Company filed an interlocutory appeal under 28 U.S.C. § 1292(b), which was granted.

The Court of Appeals on August 16, 1977 affirmed the decision of the District Court.

FACTS

The municipalities' complaint alleges that I&M is a vertically integrated electric power company, which generates electric power, transmits the power throughout its service area, and delivers the power both to its wholesale customers, including the plaintiff municipalities, and directly to its own retail customers. [Complaint, para. 4; Pet. App. 57a.]. The defendant I&M is the only firm within its service area engaged in the business of transmitting and selling electric power at wholesale. The Company is the municipalities' only outside source of supply for wholesale electric power. [Complaint, para. 5; Pet. App. 57a.] I&M also dominates and controls the distribution and sale of retail electric power within its service area. The defendant Company has increased its control of the retail market by acquiring municipal electric utilities. Since 1957 the defendant has purchased the assets of four of the 20 municipal utilities within its service area, has absorbed their retail distribution

facilities into the I&M system, and has taken over their retail industrial, commercial and residential customers. The Company now controls the distribution and sale of retail electric power in more than 90% of the communities within its service area, while municipally owned and operated electric systems serve retail customers in fewer than 10%. [Complaint, para. 6; Pet. App. 58a.]

The complaint alleges that I&M has monopolized and attempted to monopolize interstate trade and commerce in the distribution and sale of electric power at retail, in violation of Section 2 of the Sherman Act, by establishing a dual system of electric rates under which it has required the plaintiff municipalities beginning in 1973 to pay a new, higher wholesale price for electric power. In contrast to its previous practice the Company set its new wholesale price to municipalities at a substantially higher level than the Company's retail price to its own industrial customers. The difference between the Company's prices has prevented the plaintiffs from buying power from the Company at the new wholesale price and selling it to industrial customers at prices competitive with the Company's own retail prices and has exerted pressure on the plaintiff municipalities to sell or lease their electric utilities to the defendant Company. [Complaint, paras. 7-8; Pet. App. 58a-60a.] The Company's acts and practices have been done with the intent, and have had the effect, of monopolizing the distribution and sale of electric power at retail and have injured the plaintiff municipalities in their business and property in an amount exceeding $1,000,000 before trebling. The complaint alleges that the plaintiffs' losses are continuing. Unless the relief requested by the complaint is granted, the defendant Company will continue to violate 15 U.S.C. Section 2. [Complaint, paras. 9-10; Pet. App. 60a-61a.]

The complaint requests declaratory and injunctive relief, including an order enjoining I&M from maintaining a disparity between the prices at which it sells electric power and under which it requires the plaintiff municipalities to pay a higher wholesale price than the retail prices at which it sells and distributes power to its own industrial customers.

On May 1, 1974 the defendant I&M moved to dismiss the complaint or to stay the District Court proceedings until the conclusion of the regulatory proceeding involving the rates Petitioner charges to its wholesale municipal customers, including the plaintiffs. The Commission proceedings referred to were the rate proceedings commenced by I&M's filing new wholesale rates before the Commission on June 13, 1972. At that time, the Commission refused to consider the anticompetitive effects of the Company's dual price system, because the Company's retail rats were beyond its jurisdiction.

The District Court denied the defendant's motions on May 1, 1975. [Pet. App. 31a.] Though the defendant contends that the complaint challenges the defendant's wholesale rates and retail rates, the Federal Commission's approval of wholesale rates, and the Indiana and Michigan state commissions' approval of retail rates, the District Court found that the complaint does not involve rate setting but instead seeks relief from the Company's monopolization through the practice of filing dual rates before separate agencies.

On October 22, 1976 the District Court denied I&M's motion to reconsider, vacate, set aside and amend the District Court's order. [Pet. App. 54a.] By then an initial decision had been issued by an administrative law judge in the 1972 wholesale rate proceeding before the Federal Power Commission without producing any findings or decisions on the anticompetitive questions. Meanwhile, on May 28, 1976 the Company reestablished the dual price system on a higher level by requiring the municipalities, commencing in July 1976 to pay a new, higher price for electric power in excess of the retail price the Company charges its own industrial customers, thereby preventing the municipalities from competing against the Company for retail sales. Thereafter the parties to the 1972 rate case disposed of that proceeding by agreeing to a financial settlement based on the initial decision on cost of service principles only. [Transcript of District Court proceedings on Oral Argument, October 22, 1976.]

COURT OF APPEALS DECISION

On August 16, 1977 the Court of Appeals for the Seventh Circuit denied the Petitioner's interlocutory appeal and affirmed the May 1, 1975 and October 22, 1976 orders of the District Court. The Court of Appeals held that I&M's practice alleged by the complaint, of setting dual rates that discriminate against the Company's wholesale municipal customers in favor of its retail customers, is subject to the antitrust laws and that the Federal Power Commission does not have exclusive jurisdiction of the issues raised by the complaint. Following this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court of Appeals held that no state action has immunized the Company's practices from the operation of the antitrust laws.

The Court, following the decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), rejected I&M's contention that the law requires the District Court to stay proceedings pending a final decision by the Federal Commission on I&M's 1976 wholesale rate filing. While recognizing the District Court's discretion to defer to the Commission, the Court of Appeals found no circumstances compelling deferral in this case. Instead, the Court of Appeals observed that deferral could postpone antitrust relief until the defendant company's monopolization of the retail power business in its area is complete.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED

There is no dispute among the parties that this is a case of first impression. There are no conflicting decisions from other circuits.

The Court of Appeals took this case on an interlocutory appeal. The case in the District Court has not progressed beyond I&M's motion to dismiss. There have been no discovery proceedings, no evidentiary hearings, and no findings of fact by the District Court.

The District Court correctly denied the Company's preliminary motion and was properly sustained on appeal. Denial of certiorari at this time will not foreclose any party's right to review after the case is decided on the merits.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE FEDERAL COMMISSION DOES NOT HAVE EXCLUSIVE JURISDICTION OF THE ANTITRUST ALLEGATIONS IN THE COMPLAINT

The Petition argues that the Court of Appeals' decision disregards the "natural implications" of *FPC v. Conway Corp.*, 426 U.S. 271 (1976), that the antitrust violations alleged by the complaint are within the exclusive jurisdiction of the Federal Commission. The municipalities allege that I&M is monopolizing the retail electric power business by filing rates before the Federal and state commissions so as to establish a dual price system that discriminates against the Company's competitors who depend on it for their supply of electric power. I&M claims that the municipalities' allegation should be adjudicated, if at all, before the Federal Commission in wholesale rate proceedings. However, as the Court of Appeals observed, the Commission lacks authority to remedy the antitrust violations alleged in the complaint or to prevent repeated violations in the future.

> Nothing in the Supreme Court's opinion in *Conway* suggests exclusive jurisdiction, as defendant concedes (D. Br. 32). Indeed, *Conway* suggests that the FPC remedy is limited to setting the jurisdictional rate somewhere above the lower boundary of the zone of reasonableness. A rate set so low that it would fail to recoup fully allocated wholesale costs seems to be beyond the Commission's power. 426 U.S. at 278. If the retail rates have been set so low by the state utility commissions that a price squeeze could only be fully remedied by setting the wholesale rates below the

lower boundary of the zone of reasonable recovery for fully allocated costs, the squeeze would go unremedied to the extent a wholesale rate set at the lower boundary of the zone of reasonableness did not cure the problem. Although *Conway* was brought to the district court's attention, it refused to vacate its order declining to dismiss the complaint and to stay the action. [Pet. App. 15a-16a.]

The Federal Commission itself concedes that it lacks exclusive jurisdiction over conduct of the sort alleged here, and that it lacks the authority to grant the necessary relief. As the Court of Appeals stated:

> [i]ndeed the Federal Power Commission has conceded that it does not have exclusive jurisdiction over conduct such as that alleged here . . . On May 23, 1977, the Federal Power Commission released an order in *Northern States Power Company*, FPC Docket No. ER 76-818, stating that the Commission's examination of the alleged price squeeze would not affect the district court action in *Shakopee* because
>
> "That action seeks damages for allegedly anticompetitive activity that occurred in the past. As the District Court noted in its October 18, 1976, order denying Northern States' motion to dismiss, should Shakopee prove itself entitled to relief the regulatory process would not be disrupted by an award of damages for past conduct nor by an enjoining of certain future conduct. These remedies are beyond our jurisdiction as we cannot look to past rate schedules and, if a price squeeze were found, we could not take any remedial action. Accordingly there is no alternative to this issue being litigated in both forums, one concerning itself with present rates and the other with past rates and possible future conduct." [Pet. App. 20a-21a.]

Contrary to the Company's claim, antitrust proceedings before the District Court will not disrupt wholesale rate proceedings before the Commission. As the Court of Appeals held:

> [i]f the plaintiffs prove their case, instead of interfering with any rates approved by the Federal Power Commission, in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendant's industrial customers. The court would thus not be affording a remedy that would "starkly conflict with the explicit stautory mandate of the Federal Power Commission * * * [or] improperly preemp[t] the jurisdiction of the Federal Power Commission. * * *." *Otter Tail Power Co., supra*, 410 U.S. at 395 (concurring and dissenting opinion of Justice Stewart). As shown from the opinion below and from the opinion in *Shakopee, supra*, the district court intends to apply the antitrust laws "to the public utility industry only to the extent that the antitrust claims asserted are not within the reach of the regulatory agency's supervision," the very standard recommended by defendant (Br. 21). Under *Otter Tail Power Co., supra*, and *Gulf States Utilities Co, supra*, in fashioning any relief that may be warranted under the Sherman Act, the judiciary must be careful to avoid or resolve any inconsistency with Section 205 of the Federal Power Act. We are confident that the district court will observe this stricture.

Indeed the opinions of the district courts in this case and in *Shakopee* show that they do not intend to interfere with the Federal Power Commission's jurisdiction, because if the Commission should find the respective defendant's higher wholesale rates to be just, the courts would, on proof of violations of Section 2 of the Sherman Act, order the defendants to initiate new rate structures eliminating the dual price system of

> higher wholesale prices. If the Commission should find the present wholesale rates to be unjust, then the courts would only enjoin the defendants from future dual systems violative of the Sherman Act. Both district courts noted too that it would not disrupt the regulatory process to award damages for any past anti-competitive conduct proved at trial. Therefore, a stay is unnecessary to avoid a clash between the antitrust laws and the Federal Power Act. [Pet. App. 26a-27a.]

The Federal Power Act has not impliedly repealed the antitrust laws in the electric power industry or with respect to the anticompetitive practices alleged by the complaint in this case. In *Otter Tail Power, supra,* this Court held:

> [t]here is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.
>
> * * *
>
> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment an dnot regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. See *United States v. Radio Corp. of America, supra,* 358 U.S. at p. 351. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 USCA Section 29a(b)(2). [410 U.S. at 373-374.]

Though the Act authorized the Commission to compel the defendant Otter Tail to interconnect with the municipal systems and sell them power, the Act did not thereby delegate antitrust enforcement to the Commission or remove antitrust jurisdiction from the District Court. The standard governing the Commission's decision whether to order interconnection is whether

> such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative. [410 U.S. at 373.]

The power company's argument in the present case for exclusive jurisdiction in this case is weaker than the company's argument in *Otter Tail.* Though the FPC had full authority to remedy Otter Tail's refusal to sell power to municipal utilities, the Commission has no authority to enjoin I&M's practice of filing dual wholesale and retail rates in the future. Though the Commission may issue orders altering particular wholesale rates after I&M files them and may consider the retail rates filed by the Company in arriving at its wholesale rate orders, the Commission has no authority to affect the Company's retail rates directly, or to prevent the Company from repeatedly filing discriminatory wholesale rates to its customers. [*FPC v. Conway Corp., supra,* 276-277.]

In its decision the Court of Appeals, following *Otter Tail,* held:

> [w]ith respect to implying a repealer of the antitrust acts, Judge Lord began with the now settled axiom that after *Otter Tail power Co. v. United States,* 410 U.S. 366, "there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities." *Cantor, supra,* at 596 n.35. Since the antitrust laws are not generically superseded by the regulation of electric utilities, the only question open to debate is whether "the particular application of the [antitrust laws] is irreconciliably repugnant to the operation of the regulatory scheme." *Id.* Judge Lord

decided that there was "little or no apparent conflict between applying the antitrust laws to the type of conduct complained of here and the smooth and efficient functioning of the FPC's regulatory system" (mem. op. 5). As in *Shakopee*, the price squeeze alleged in our case

> "is not between rates set by one regulatory agency, as was the case in *Georgia* [*v. Pennsylvania R. Co.*, 324 U.S. 439], but rather is between the 'wholesale' rate set by the FPC and the 'retail' rate over which the FPC has no jurisdiction. Put simply, under these circumstances, antitrust immunity is not 'necessary' to the functioning of the regulatory process because the discrimination is 'external' to that process. The FPC does not control both ends of the discriminatory conduct." (mem. op. 7 n.6)
>
> If plaintiff proves it is entitled to relief on the Sherman Act claim asserted in its complaint, the Federal Power Commission's regulatory process would not be disturbed by the court's awarding damages for past anticompetitive conduct or by enjoining future anticompetitive conduct by defendant in making and prompting its rate applications. Thus relief could be granted without the district court's actually becoming involved in the process of setting rates. [Pet. App. 19a-20a.]

III. NO STATE ACTION IMMUNIZES I & M'S ANTICOMPETITIVE PRACTICES FROM THE ANTITRUST LAWS

The petition contends that the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), exempts the Company from antitrust review of its practice, as alleged, of filing different rates before different commissions so as to monopolize the retail electric power business in its area. However, as the complaint shows and the

Court of Appeals found, the municipalities do not challenge rates established by state agencies, nor do they challenge state action of any kind.

> As in *Cantor*, the plaintiff municipalities have named no state officials or state agencies in the complaint, and there is no claim that any state action violated the antitrust laws. See 428 U.S. at 591-592. Thus under the plurality opinion, *Parker v. Brown* does not even arguably apply to the facts of our case. Nor do Chief Justice Burger or Justice Blackmun's concurrences in *Cantor* give defendant solace. The challenged activity here is a dual rate structure. The state utility commissions have only put the imprimatur of their sanction on the retail rates charged by the defendant. The price squeeze has not been blessed by Indiana or Michigan. The fact that the district court has no authority to maintian a direct attack on the defendant's retail rates does not alter the reality that the state commissions have in no way placed a badge of approval on the defendant's dual rate structure. Consequently, defendant's conduct is not immunized under *Parker v. Brown*.

Having decided that the Sherman Act applies in the first instance to the conduct at issue here, we must decide whether an exemption nonetheless has been worked. Justice Stevens, in a portion of *Cantor* subscribed to by a majority of the Court, suggested two geneses for such an exemption. First, it might be unjust to hold a private citizen liable for conduct imposed by the direct command of the sovereign. Secondly, if the sovereign is already regulating an area, Congress may not have intended to superimpose the antitrust laws as an additional and perhaps conflicting regulatory scheme.

In *City of Shakopee v. Northern States Power Co.*, Civ. No. 4-75-591 (D. Minn. 1976), a post-*Cantor* case involving a virtually identical dual rate structure creating a price squeeze between the wholesale and

retail sale of electric power, Judge Lord concluded that no exclusive jurisdiction existed in the Federal Power Commission because an exemption from the antitrust laws could not be implied. Judge Lord interpreted the first genesis for exemption under *Cantor* to be based on the reasoning that

"if an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anti-competitive condition is in reality the work of that company and is not 'necessary' to the functioning of the regulatory scheme and will not be immunized from antitrust liability." (mem. op. 6)

Accordingly, the court noted that, as here, defendant Northern States Power Co. could have avoided the alleged monopolistic position by "tailoring its applications to allow for competitive 'wholesale' and 'retail' power rates" (mem. op. 7) and that, given such company autonomy, this position was not "necessary" to the functioning of the regulatory scheme. [Pet. App. 17a-19a.]

Bates v. State Bar of Arizona, ___ U.S. ___, 97 S. Ct. 2691 (1977), on which the Company relies heavily, involved a direct challenge to state action and is inapplicable for the reasons given in the Court of Appeals' analysis.

IV. THE COURT OF APPEALS CORRECTLY REFUSED TO REQUIRE THE DISTRICT COURT TO DEFER TO THE FEDERAL COMMISSION

The Court of Appeals sustained the District Court's exercise of its discretion in refusing to delay this case pending a final decision by the Federal Commission in the administrative proceedings arising out of the Company's 1976 wholesale rate filing. In its disposition of the case the Court of Appeals provided as follows:

> While we are holding that the district court need not stay further proceedings herein, we agree with Judge Grant that if the district court should ever find it necessary to ascertain particular Commission action in order to decide the exact scope of antitrust damages, or for other purposes, the court may then stay its hand for the purpose of awaiting the Commission result. [Pet. App. 30a.]

The Petition argues that the Court of Appeals erred in not requiring the District Court to postpone proceedings until the rate case before the Commission is concluded. However, the law does not require deferral in the circumstances of this case. As the Court stated:

> The defendant argues that since "some facets of the dispute * * * are within the statutory jurisdiction of the [Federal Power] Commission," *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302—here the *Conway*-dictated duty to set the jurisdictional rate with an eye to any price squeeze between it and the non-jurisdictional rate—the Federal Power Commission must be deemed to preempt antitrust jurisdiction. However, that position was also foreclosed by *Otter Tail Power Co., supra*. There only the dissenting Justices would have required the antitrust court to defer to the Commission proceedings. 410 U.S. at 392-395. The other Justices affirmed a decree under Section 2 of the Sherman Act (except in one respect immaterial here) without requiring a stay where there was only a potential conflict between the federal judicial decree and a future order of the Federal Power Commission. 410 U.S. at 376-377. Any suspicions that the 4-3 vote in *Otter Tail* impairs its authority seem wholly unwarranted in light of the *Cantor* majority's repeated citations of it with approval. See also *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 758. [Pet. App. 22a-23a.]

The Court found that no conflict is likely. [Pet. App. 27a.] Under its disposition of the case, the District Court has discretionary authority to defer, if a potential conflict appears which makes deferral necessary.

> Assuming that a discretionary stay could be appropriate even when primary jurisdiction is not in the Federal Power Commission, the district court certainly did not abuse its discretion here. Indeed, the equities weigh heavily in favor of the plaintiff municipalities. The Illinois Municipals point out that the district court should be permitted to proceed in order to avoid the typical lengthy delays that occur in processing wholesale rate increases under Section 205 of the Federal Power Act (16 U.S.C. § 824d). Under that provision, a public utility files its rate increase application no less than 30 days before the effective date thereof, and the Commission typically suspends the proposed rate from one day to five months, with refunds required if the rate is found to be above the statutory "just and reasonable" standard. The wholesale rate increase in the present case stems from a June 13, 1972 application by defendant, and the case was not terminated in the Commission until it approved a settlement on June 1, 1977, a span of five years. Except for the settlement, the case would still pend before the Commission.
>
> Thus far, the Commission has never rejected a rate filing on price squeeze or other antitrust grounds, and there is no limit on the number of filed increases that may be in effect at the same time under Section 205. Simply by filing an anti-competitive increase and waiting for time to pass, a public utility like defendant can place a price squeeze on wholesale customers. As the Commission has stated, "electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge those rates subject to refund, pending Commission decision." [FPC Order No. 487, 50 FPC at 127 (1973).]

Under this procedure, the price squeeze can continue between the time the Commission allows the rates to go into effect and its final order, for the new *Conway* remedy as to price squeezes does not become effective until then. Thus if a stay were granted to defendant.. plaintiffs and customers in similar positions would be unable to secure any relief from price squeezes like this until the Commission finally approved the filed rates. As the Illinois Municipals have picturesquely put it:

> "Delay, combined with the multiple rate increases, could mean that the customer has been put out of business by his supplier-competitor. You cannot give refunds to a corpse." (Br. 27-28.)

Furthermore, the Commission would be unable to afford complete relief because the Federal Power Act does not provide for damages or for an injunction against a utility violating the antitrust laws. Thus a stay in this case would excuse defendant's alleged non-compliance with the antitrust laws for a completely unnecessary length of time. [Pet. App. 28a-30a.]

If the current administrative proceeding moves at the same pace as the Commission's 1972 proceeding, it will not produce an initial decision by an administrative law judge until 1980, or six years after the filing of the District Court case. Additional time will elapse if the initial decision is reviewed by the Commission itself and appealed by I&M or any other party. Meanwhile, the effects of the Company's practice, alleged by the complaint, of repeatedly filing rates that maintain a dual price system continue to exert pressure on the municipalities to drop out of the electric utility business and to sell or lease their municipal utilities to their competitor-supplier, I&M.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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